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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 327

E. B. FUTRALL, Receiver of The Lee County National Bank, Marianna, Arkansas, *Petitioner*,

versus

MRS. ELLA M. RAY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency, of Counsel.

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MRS. ELLA M. RAY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. B. Futrall, as Receiver of The Lee County National Bank of Marianna, Arkansas, by direction of the Comptroller of the Currency of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above captioned cause (R. 14, 18) entered May 13, 1940, and reported in 111 F. (2d) 695.

I.

OPINIONS OF COURTS BELOW.

The judgment of the District Court of the United States for the Eastern Division of the Eastern District of Arkansas appears on p. 8 of the Record. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 111 F. (2d) 695, and appears in the Record on pp. 14 to 17.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals to be reviewed was entered on May 13, 1940 (R. 14). Jurisdiction is conferred upon this court to review this cause by writ of certiorari under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. C., Title 28, Section 347(a)).

III.

SUMMARY STATEMENT.

The facts are not in controversy. On or about March 6, 1933, the Comptroller of the Currency declared the Lee County National Bank of Marianna, Arkansas, to be insolvent and thereupon closed the bank. On May 1, 1934, the Comptroller of the Currency appointed A. F. Callaway as receiver of said bank and he was subsequently succeeded by E B. Futrall (R. 1). On July 6, 1934, the Comptroller of the Currency levied an assessment upon all of the stockholders of said bank, to be paid by them on or before August 13, 1934, equal to fifty *per centum* of the par value of each and every share of the capital stock of said association including an assessment against the respondent, Ella M. Ray, in the amount of $1,333.33, said assessment being in the sum of $50.00 per share on 26-2/3 shares of the capital stock of said bank. The Comptroller made demand for the payment of the assessment (R. 2, 5).

On November 6, 1935, the Comptroller levied a second assessment upon all of the shareholders of said bank to be paid on or before December 13, 1935, equal in amount to the first assessment, including an assessment against the respondent in the amount of $1,333.33, and demanded payment thereon (R. 5, 6). Upon failure of the respondent to pay said assessments, these proceedings to enforce collection thereof were instituted in the District Court of the United States for the Eastern District of Arkansas on *December 7, 1938,* (R. 1, 8) to enforce the collection of an assessment in the sum of $2,666.66 with interest at the rate of six *per cent per annum* on the sum of $1,333.33 from August 13, 1934, and interest at the rate of six *per cent per annum* on the sum of $1,333.33, from December 13, 1935, on the national bank stock owned by respondent, Ella M. Ray.[1] The respondent filed her answer on March 15, 1939, (R. 8) admitting all the allegations of the complaint but pleading specifically the statute of limitations of the State of Arkansas as a complete bar to the right of petitioner to maintain his cause of action. The District Court sustained the respondent's plea and dismissed the bill of complaint (R. 8, 9).

Petitioner requested the District Court to render conclusions of law, in substance, as follows:

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[1] When this suit was instituted, the receiver relied upon *Armstrong* v. *McAdams,* (C. C. A. 8th, 1931) 46 F. (2d) 931, as authority for the proposition that the five year statute of limitations of Arkansas was applicable. On March 6, 1939, which date was prior to the District Court's ruling in the instant case, the Arkansas Supreme Court handed down its opinion in *Vandover* v. *Lumber Underwriters et al.,* 126 S. W. (2d) 105, 110, holding that the three year statute of Arkansas applied to actions to enforce national bank stockholders' liability. The Eighth Circuit Court of Appeals thereupon in *Futrall* v. *Branson,* (June 20, 1939) 104 F. (2d) 409, in effect overruled *Armstrong* v. *Adams, supra,* on the authority of *Vandover* v. *Lumber Underwriters et al., supra.* Hence, the receiver's action to enforce the first fifty *per centum* assessment was barred in any event and the appeal in the instant case was limited to the second fifty *per centum* assessment.

(1) The Arkansas statute of limitations is not a bar to the right of the receiver to recover the assessment levied by the Comptroller of the Currency on November 6, 1935, to be paid December 13, 1935;

(2) The statute of limitations begins to run from December 13, 1935, the date fixed by the Comptroller for the payment of the second assessment;

(3) The respondent, having admitted all of the allegations of the complaint, petitioner is entitled to recover judgment for the amount of $1,333.33 and interest at the rate of six *per cent per annum* on said amount from December 13, 1935, until paid (R. 9, 10).

The District Court concluded that in as much as the complaint was not filed within three years from the date of the levy of the assessment by the Comptroller, the defendant's plea of the statute of limitations should be sustained and the complaint dismissed (R. 10).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of the District Court was affirmed. 111 F. (2d) 695 (R. 14).

IV.

THE QUESTION PRESENTED.

Was the Receiver's suit barred by the Arkansas three year statute of limitations, the suit having been filed more than three years from the date of the Comptroller's levy of the assessment, but less than three years from the date the assessment was made payable?

V.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the Receiver's suit for collection of the second fifty *per centum* assessment was barred by the Arkansas three year statute of limitations.

The Appellate Court erred in holding that the cause of action accrued from the date the Comptroller levied the assessment.

The Appellate Court erred in failing to hold that the cause of action would not accrue until the date set by the Comptroller of the Currency for payment of the assessment liability.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The ruling of the Circuit Court of Appeals in this case that the Arkansas three year statute of limitations commenced to run from the date the Comptroller levied the assessment rather than from the date the assessment was made payable, appears to be directly in conflict with the decisions of four other Circuit Courts of Appeal. See: *Strasburger* v. *Schram,* (App. D. C. 1937) 93 F. (2d) 246; *Reich* v. *Van Dyke,* (C. C. A. 3rd, 1939) 107 F. (2d) 682; *Haight* v. *First Trust and Deposit Co.,* (C. C. A. 2nd, 1940) 112 F. (2d) 572; *MacPherson* v. *Schram,* (C. C. A. 5th, 1940) 112 F. (2d) 674.

(b) The question presented in the instant case is of substantial importance in that it is, or will be, involved in the liquidation of other national banks now in receivership, and an authoritative determination of the question by this court will facilitate the administration of the affairs of these banks by the Comptroller of the Currency.

(c) The ruling of the Circuit Court of Appeals that the cause of action accrued on the date the Comptroller levied the assessment involves an important question of law which has not been but should be settled by this Court. The discussion herein shows that the

decision of this court in *Pufahl* v. *Estate of Parks*, (1936) 299 U. S. 217, relied upon by the Circuit Court of Appeals as determinative of this matter, did not pass upon the particular question here involved and statements in the opinion thereof in regard thereto must be considered as *dicta*, because the settlement of the question was not necessary for a decision in the *Pufahl case*.

VII.

DISCUSSION.

The Cause of Action in This Case Did Not Accrue Until the Date Set by the Comptroller of the Currency for Payment of the Assessment Liability, and Hence it is not Barred by the Three Year Statute of Limitations.

The provisions of the National Bank Act, (Act of June 3, 1864, c. 106, 12 U. S. C., Sec. 63 and 64; Act of June 30, 1876, c. 156, 19 Stat. 63, Sec. 5234 of the Revised Statutes; 12 U. S. C., Sec. 191 and 192), create statutory personal liability of shareholders in national banks for the debts and obligations of the banks and authorize the Comptroller of the Currency, through duly appointed receivers, to enforce such personal liability.

Petitioner submits that the weight of authority is to the effect that the liability of a shareholder for such assessment does not become due and payable until the Comptroller of the Currency determines the necessity for its collection, levies the assessment therefor, and fixes the time of its payment, and that the right of the receiver to bring suit upon the assessment does not come into existence until the date fixed by the Comptroller for the payment of the assessment thus levied. In *Kennedy* v. *Gibson*, (1869), 8 Wall. 498, at p. 505, it was said:

> "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary

to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

It has been the uniform and longstanding practice of the Comptroller of the Currency, in collecting assessments from shareholders of insolvent national banks, to fix in the order of assessment, a future date for the payment of the assessment and formal notice to and demand upon the shareholders so indicates. The practice was followed in the instant case (R. 5-8). This practice was recognized by the United States Court of Appeals for the District of Columbia in the case of *Strasburger* v. *Schram,* (1937) 93 F. (2d) 246, wherein Judge Groner stated (at page 248):

"We take judicial notice of the fact that for many years it has been the general practice of the Comptroller, after determination that an assessment on stockholders in a national bank is necessary and of the amount thereof, to fix a date when payment must be made. The practice is a reasonable one, since it furnishes time and opportunity to the debtor to pay without suit and in some cases opportunity for reorganization and resumption of business; and we have been referred to no law and have found none ourselves to challenge the authority of the Comptroller to fix the time of payment and to extend it within reasonable limits from time to time. Nor have we any doubt that when this is done the receiver cannot commence an action against the stockholder until after the date fixed, for the simple reason that until such date the assessment is not due; or, in other words, does not exist as a complete right which the owner may enforce by going into court."

It has been stated by this Court from time to time that great weight may properly be given to the settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson,* (1929) 280 U. S. 183, 193; *Heath* v. *Wallace,* (1891) 138 U. S. 573, 582; *Brewster* v. *Gage,* (1929) 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young,* (No. 6, U. S. S. Ct., March 25, 1940).

In as much as it is clearly within the discretion of the Comptroller of the Currency as to whether he will levy an assessment at all, and if so, at what stage in the liquidation of the particular receivership he will do so, it would seem necessarily to follow that it is also within his discretion to prescribe or fix the date such assessment is to become due and payable. Conceding that the Comptroller could levy an assessment and make it payable forthwith and thus subject the shareholder to immediate suit for collection of the assessment, certainly the Comptroller, instead of making the assessment payable immediately, can make it payable at a designated future date. The portion of the order levying the assessment and thus creating the liability is necessarily qualified by that portion of the same order which fixes the date the assessment is payable, such latter provision thereby having the effect of delineating and defining the enforcibility of the liability thus created. The cause of action upon the assessment thus levied cannot legally come into being until there has been default in payment on the date fixed for payment by the assessment order. The situation of the debtor, in such event, is analogous to that of the debtor on a promissory note payable at a future date. His obligation exists from the execution of the note, but he cannot be sued upon the note until it becomes due and is in default. This position seems to be within the clear purport of *Strasburger* v. *Schram, supra* (pg. 246) and it also seems to be indicated

in: *Deweese* v. *Smith,* 106 Fed. 438, 446; (C. C. A. 8th, 1901) affirmed 187 U. S. 637; *Rankin* v. *Miller,* (Del. 1913) 207 Fed. 602, 610; *King* v. *Pomeroy,* (C. C. A. 8th, 1903) 121 Fed. 287, 297; *Hall* v. *Ballard,* (C. C. A. 4th, 1937) 90 F. (2d) 939, 945.

The Arkansas statute of limitations provides (Section 8928, Pope's Digest of Statutes of Arkansas, (1937):

> "The following actions shall be commenced within three years after the cause of action shall accrue, and not after:
>
> First. All actions founded upon any contract or liability, expressed or implied, not in writing."

The court below failed to cite and we have found no Arkansas Supreme Court decisions indicating that the Arkansas three year statute of limitations would commence to run from the date the Comptroller levied the second 50 *per centum* assessment on November 6, 1935, whereas practically all courts which have passed upon the question, including four other Circuit Courts of Appeal and various District Courts, have held that the applicable state statute of limitations commences to run from the date fixed by the Comptroller for payment of the assessment.

The Supreme Court of Arkansas has held: *"It is well settled that the statue of limitations does not begin to run in any case until there is a complete and present cause of action." Holloway* v. *Morris,* (1931) 182 Ark. 1086, 34 S. W. (2d) 750, Also see: *Louisville Silo & Tank Co.* v. *Thweatt,* (1927) 174 Ark. 437, 295 S. W. 710; *Cairo & Fulton R. R. Co.* v. *Parks,* (1877) 32 Ark. 131, 152; *Denton's Ex'rs.* v. *Embury & Young,* (1849) 10 Ark. 228, 232. Even in suits for recovery of debts the Supreme Court of Arkansas has looked for the payment date, it appearing both in *Sturdivant* v. *McCorley,* (1907) 83 Ark. 278, 281, 103 S. W. 732 and *Kempner* v. *Gans,* (1908) 87 Ark. 221, 228, 111 S. W. 1123, that the court said: *"as no time was set* for the payment, the debt was in law payable on demand."

There can be no question but what the assessment made by the Comptroller in the instant case fixed a time for payment of the assessment by the shareholders of the insolvent bank (R. 5, 6).

While the Arkansas statutes govern as to the period of time within which an action must be brought, the power of the Comptroller of the Currency to order an assessment, to fix a date for the payment thereof, and the effect of such an order, involves Federal statutes and their interpretation, and in such a field the Federal Courts are supreme and not controlled by state court decisions. *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, 78; *Board of County Commissioners* v. *United States,* (1939) 308 U. S. 343, 349; *Deitrick* v. *Greaney,* (1940) 309 U. S. 190, 200; *Downey* v. *City of Yonkers,* (S. D. N. Y. 1938) 23 F. Supp. 1018, 1023; affirmed (C. C. A. 2d. 1939) 106 F. (2d) 69 and Nos. 542/3/4/5 U. S. S. Ct., Apr. 22, 1940.

The general rule is stated in 1 Corpus Juris Secundum, Section 124 at page 1386 and 1387 as follows:

> "As applied to a cause of action, the term 'to accrue' means to arrive, to commence, to come into existance, to become a present enforcible demand, and a cause of action is deemed to have accrued when facts exist which authorize one party to maintain an action against another, or at the moment when the party owning it has a legal right to sue thereon.
>
> • • • •
>
> "A creditor's legal right to sue his debtor accrues when the debt or demand is due and not before."[2]

Volume 2, Wood on Limitations (4th Ed.) Section 164, p. 797, makes this statement with respect to assessments, taxes, etc.:

> "Where an assessment or tax is laid, and by ordinance or statute a certain time is fixed within which

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[2] As authority for this rule of law the following Arkansas case is cited in support thereof. *Jones* v. *Dyer,* 92 Ark. 460; 123 S. W. 757.

it may be paid, the person against whom it is laid has the whole of such period within which to pay it, and the statute does not begin to run thereon until such time has expired. Thus, where an assessment was imposed by an ordinance which provided that, unless paid within twenty days, the debtor should be subjected to penalty and interest, it was held that the statute began to run from the expiration of the twenty days; and the same rule applies in the case of taxes. If the statute or the note under which it was raised specifies a certain time within which it shall be paid, the taxpayer has the whole of that period to pay it in, and the statute does not begin to run until such period has elapsed."

In 6 Williston on Contracts (Rev'd. Edition 1938) Sec. 2040, it is stated:

"It is a fundamental principle that the (statute of limitations) does not begin to run until any condition necessary to the existence of a right of action has happened, * * *.

"Where, moreover, an obligation is payable a certain time after demand, the statute does not begin to run until demand has been made and the specified time thereafter has elapsed."

In 1 Morse on Banks and Banking, Sec. 678, it is stated:

"The right of action against a stockholder of an insolvent national bank does not accrue until assessment is made by the Comptroller, and until there has been a demand of payment and refusal to pay. The national banking act fixes no definite time within which the Comptroller must act."

Until the United States Court of Appeals for the District of Columbia decided the case of *Strasburger* v. *Schram*, on November 15, 1937, 93 F. (2d) 246, there was no authoritative decision directly in point on the question here involved. However, certain expressions by this Court were found helpful by the Court of Appeals for the District of Columbia as indicating the principle that the date

fixed by the Comptroller for payment and not the date of assessment was the date when the cause of action accrued and the statute of limitations began to run.

In *McDonald* v. *Thompson*, (1902) 184 U. S. 71, the Court said at p. 72:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable, *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Marbury*, 145 U. S. 499; *Thompson* v. *German Insurance Company*, 76 Fed. Rep. 892; *Van Pelt* v. *Gardner*, 54 Neb. 701 * * *".

And in *McClaine* v. *Rankin*, (1905) 197 U. S. 154, 158, the Court said:

> "And as this action was commenced within three years, but not within two years, *after the assessment became due and payable*, the question is whether subdivision 3 of Sec. 4800 applies."

Again, this Court had before it in *Bernheimer* v. *Converse*, (1907) 206 U. S. 516, an equity case in which the court ordered an assessment against the shareholders of a Minnesota manufacturing corporation. The order required each shareholder to pay the amount of the assessment to the receiver within 30 days after the date of the order and on the suggestion that the case was barred by the statute of limitations, the Court stated at p. 534:

> "The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota Court of December 22, 1902."

The order was to pay within 30 days after the date of the order and it was this latter date, rather than the date of the order, on which this Court said the right of action accrued.

The Circuit Court of Appeals for the Sixth Circuit recognized this principle in *Barbour* v. *Thomas*, (1936) 86 F. (2d) 510, *cert. denied* 300 U. S. 670. In discussing the as-

sessment on the stockholders of the First National Bank-Detroit on May 16, 1933, and the receiver's right to enforce such assessment against the stockholders of the Detroit Bankers Company, a bank stockholding company, the court said at p. 514:

> "He [the national bank receiver] could not commence an action before July 31, 1933, since the assessments were not due until that date."

In *Strasburger* v. *Schram, supra,* the Court of Appeals for the District of Columbia had squarely before it the single question of whether the cause of action accrued upon the declaration by the Comptroller of the deficiency or whether it accrued on the final date fixed by the Comptroller for payment. The appellant in that action claimed the date the Comptroller declared the deficiency and fixed the amount was the date the action accrued, while the receiver contended the date fixed for payment was the controlling date. The court held that until the unconditional liability to pay is fastened on the debtor, no action can be maintained against him and the statute does not begin to run in his favor. Accordingly, it was the opinion of the court that no liability accrued on the assessment until the date when the same was made payable.

In the case of *Reich* v. *Van Dyke,* (1939) 107 F. (2d) 682, the United States Circuit Court of Appeals for the Third Circuit, in affirming the decision of the United States District Court for the Middle District of Pennsylvania, reported in 27 F. Supp. 436, stated that the sole question involved was whether the Pennsylvania statute of limitations would run from the date of assessment against shareholders as levied by the Comptroller or would run from the payment date. Judge Clark held that "cause", as used in the Pennsylvania statute providing that actions for debt shall be commenced within six years next after the cause of such action, means when the action "accrues" or "arises", and the right to sue becomes available. That

date was held to be the payable date of the assessment and hence the date from which the statute began to run.

The question of the accrual date of the cause of action to recover the assessment on national bank stock was likewise at issue in *Haight, Receiver of the Salt Springs National Bank of Syracuse, N. Y.* v. *First Trust and Deposit Company,* (N.D. N.Y. 1939) 33 F. Supp. 72. On May 1, 1934, the Comptroller ordered the assessment with a demand for payment on or before June 8, 1934. Suit was begun May 21, 1937. There was no question but that the three year statute of limitations, as set forth in Section 49 of the New York Civil Practice Act governed. The dispute was as to when the statute began to run, that is, when the cause of action accrued. Judge Bryant held that until default on June 8, 1934, the plaintiff receiver had no right of action and that the action was commenced within the statutory period. On appeal to the Circuit Court of Appeals for the Second Circuit, the Court affirmed the United States District Court in a *per curiam* opinion on the authority of *Strasburger* v. *Schram, supra,* and *Reich* v. *Van Dyke, supra.* The Circuit Court of Appeals opinion is reported in 112 F. (2d) 572.

Again in *MacPherson* v. *Schram,* (C. C. A. 5th, 1940) 112 F. (2d) 674, the United States Circuit Court of Appeals for the Fifth Circuit in a case involving the identical question held that the three year statute of limitations of the State of Florida did not bar a suit filed by a national bank receiver more than three years after the date the Comptroller levied the assessment on the shareholders but less than three years from the date the assessment was made payable.

It was also material to the decision of the United States District Court for the Northern District of West Virginia in *Hardesty* v. *Corrothers, et al,* (January 20, 1940) 31 Fed. Supp. 365, whether the receiver's right of action to recover the assessment on national bank stock "accrued" within five years next before the commencement of the action.

The assessment was levied against the stockholders on March 19, 1934, "to be paid by them on or before the 26th day of April, 1934." The action was instituted April 24, 1939. Following *Strasburger* v. *Schram, supra,* the court held that liability upon a national bank stock assessment does not "accrue" within the meaning of the West Virginia statute of limitations at date of assessment, but at the date when the assessment was made payable.

The United States District Court for the Western District of Kentucky in *Anderson* v. *Abbott,* (1938) 23 F. Supp. 265, also passed upon this question in the following manner at p. 268:

> "An action against shareholders for an assessment does not accrue until the assessment is due and payable. The assessment was levied on February 20, 1931, and payable on April 1, 1931. This proceeding was instituted on February 19, 1936. It was April 1, 1931, that the right of action accrued. Strasburger v. Schram, App. D. C., 93 F. (2d) 246; Barbour v. Thomas, 6 Cir., 86 F. (2d) 510; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437."

A similar construction was given to the Illinois statute of limitations in the case of *Culhane* v. *Smith,* (N. D. Ill. 1937) 19 F. Supp. 226, 227, the court holding that the cause of action accrued on the date fixed for payment of the assessment.

The same conclusion has been adopted by the state courts in New York and New Jersey in *Meeker* v. *Oramam Realty Corporation,* (App. Div. N. Y. Sup. Ct. 1938) 2 N. Y. S. (2d) 574, 575, affirmed by the New York Court of Appeals (1939) 281 N. Y. 868, and *Howell* v. *Fogg,* (C. C. N. J., Cape May County, 1939) 7 Atl. (2d) 282, in cases likewise holding that under the respective state statutes of limitation the cause of action would not accrue until the last payment date for the assessment as fixed by the Comptroller of the Currency.

The Circuit Court of Appeals in the instant case bases its opinion on the decision and language used by this Court

in *Pufahl* v. *Estate of Elvira J. Parks, Deceased,* (1936) 299 U. S. 217. We submit that case in no way involves the question presented here and does not pretend to pass upon such a situation. Any statements made concerning the accrual of an assessment liability were merely *dicta* and without reference to any subsequent fixed payment date. No mention was made of a due date for the payment of the assessment and it is apparent that such date was wholly immaterial in deciding that case.

In *Coffey* v. *Fisher,* (C. C. A. 6th, 1938) 100 F. (2d) 51, also relied upon by the Circuit Court of Appeals for the Eighth Circuit in the instant case, the receiver brought suit to enforce the statutory liability of the estate of a deceased stockholder. It is submitted that the case is distinguishable from the instant case in that while the court held in the *Coffey* case that the suit was barred under the provisions of Section 8604 of the Tennessee Code, such decision was founded on the premise that the right to sue existed as of the date of the levy of the assessment, notwithstanding the fact that the assessment order provided for future dates of payment of the assessment (Op. p. 54). Such assumption by the court seems obvious error in that it nullifies that portion of the order of assessment which fixes the future date of payment and thereby renders the stockholder subject to immediate suit notwithstanding the Comptroller provides that he is not required to pay before the specified future date.

The Circuit Court of Appeals in its decision in the instant case makes the statement (R. 17) that, "as the making of the assessment fixed the liability of the stockholders, the cause of action immediately accrued, and the act of the Comptroller purporting to extend the time for payment did not toll the statute." An analysis of the cases cited by the court in support of this statement will, we believe, show that in only one of the four cases cited in support thereof was the date fixed for payment of the assessment a material factor in determining the case. That decision,—*Johnson* v. *Greene,* (C. C. A. 9th, 1937) 88

F. (2d) 683,—does not in any way determine the question presented in the instant case. There the Circuit Court of Appeals for the Ninth Circuit had before it the construction of a California statute of limitations which is different from the Arkansas statute of limitations in that the applicable California statute provides that an action on a statutory liability must "be brought within three years after * * * the liability was *created.*" Liability for assessment on national bank stock, the court held, was created on the date of the Comptroller's order and the limitation period began to run from that date, rather than the date fixed for the payment of the liability.

It will be observed that in *Strasburger* v. *Schram, supra; Reich* v. *Van Dyke, supra; Haight* v. *First Trust and Deposit Co., supra* and *MacPherson* v. *Schram, supra,* the Court of Appeals for the District of Columbia and the Circuit Courts of Appeal of the Second, Third and Fifth Circuits, had squarely presented the question of whether the cause of action accrued on the assessment date, or on the payable date, and in each instance the courts held the cause of action accrued from the date set for payment of the assessment as distinguished from the date the assessment was levied. The same conclusion was reached by the United States District Courts in West Virginia, Kentucky and Illinois in the cases of *Hardesty* v. *Corrothers, supra; Anderson* v. *Abbott, supra; Culhane* v. *Smith, supra,* and by the New York and New Jersey state courts in *Meeker* v. *Oramam Realty Corp., supra* and *Howell* v. *Fogg, supra.* The Circuit Court of Appeals in the instant case, therefore, in holding that the cause of action accrued from the assessment date, as distinguished from the payment date, is the only Appellate Court to so hold in a case where this point was decisive in determining the result of a suit to collect the shareholder's assessment levied by the Comptroller of the Currency, and as the court in the instant case is not supported by any Arkansas state court decision so construing the applicable statute of limitations, we submit that the decision announced is erroneous.

VIII.

CONCLUSION.

It is submitted that the foregoing discussion and citation of authorities demonstrate that the decisions of the courts below were erroneous. In the interest of uniformity of decisions applicable to the administration of all insolvent national banks, and in order that the present doubt as to the correct rule of law to follow may be settled, it is urged that this Honorable Court entertain a review of this case on writ of certiorari.

Respectfully submitted,

JOHN C. SHEFFIELD,
Attorney for Petitioner.

GEORGE P. BARSE,
LEE ROY STOVER,
HARRIET BUCKINGHAM,
Attorneys for the Comptroller of the Currency, of Counsel.

APPENDIX.

U. S. C. Title 12, Sec. 63.

The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association existing on June 22, 1874, under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this chapter; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of this chapter relating to dissolution and receivership. (R. S. Sec. 5151; Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, Sec. 64:

The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent

that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, Sec. 23, 38 Stat. 273.)

U. S. C. Title 12, sec. 191.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, sec. 192.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts and,

on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. * * * (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)